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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1044

JOHNSON BONDING COMPANY, INC.
JAMES C. JOHNSON, JR. and
LEROY HAYDEN ..... Petitioners

VS.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below, from the Court of Appeals of the Commonwealth of Kentucky, styled *Commonwealth of Kentucky* v. *Leroy Hayden, Johnson Bonding Co., Inc.*

is unpublished. Therefore, a copy is attached to this brief as Appendix I and made a part thereof. The opinion of the McCracken Circuit Court, also unreported, is attached to the petitioner's brief.

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3) which is the proper provision for review of a state court decision.

QUESTIONS PRESENTED

I. **IS KRS 304.34-080 (1) (g) OVERBROAD, INDEFINITE, AND VAGUE?**

II. **DOES THE STATUTE ABRIDGE THE FREEDOM OF SPEECH OF THE PETITIONERS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?**

III. **DOES THE STATUTE SEEK TO PROTECT SOUND ETHICAL STANDARDS REQUIRED OF LAWYERS FOR THE PROTECTION OF THE PUBLIC INTEREST?**

IV. **IS THE STATUTE A REASONABLE EXERCISE OF THE POLICE POWER BY THE COMMONWEALTH OF KENTUCKY?**

STATEMENT OF THE CASE

On January 17, 1972, the McCracken County Grand Jury returned separate indictments against the Johnson Bonding Company, Inc., James C. Johnson, Jr., and Leroy Hayden, charging, inter alia, numerous

violations of KRS 304.34-080 (1) (g) which provides that no bail bondsman shall:

> "Suggest or advise the employment of any particular attorney to represent the principal."

Shortly after the indictments were returned, the defendants, by counsel, moved to dismiss the indictments on the grounds that KRS 304.34-080 (1) (g) was unconstitutional.

The McCracken Circuit Court, on February 23, 1972, entered an order sustaining the defendant's motion. The Court held that the provision in question constituted an impermissible prior restraint on the First Amendment freedoms of speech and expression, and, moreover, that this provision was vague and indefinite in violation of the First and Fourteenth Amendments to the United States Constitution.

The respondent then sought a Certification of the Law from the Court of Appeals of Kentucky. The Court of Appeals held that KRS 304.34-080 (1) (g) was constitutional and a valid and reasonable exercise of the Commonwealth's police power. The petitioner now seeks a writ of certiorari to the Court of Appeals of Kentucky.

ARGUMENT

I. KRS 304.34-080 (1) (g) IS NOT OVERBROAD, INDEFINITE, OR VAGUE.

In support of their allegation that the above statute is overbroad, indefinite, and vague, the petitioners have

resorted to mental gymnastics that would confuse Noah Webster himself. By twisting and distorting the plain and simple meaning of words familiar to even the most uneducated person, the petitioners have created a semantical swamp into which the respondent will not venture. KRS 304.34-080 (1) (g) is worded simply and concisely. There can be no doubt as to its meaning. This question was succinctly disposed of by the Court of Appeals in the case below (Appendix, p. 5a):

> "We find nothing overbroad or vague in the statute in question. Its plain, narrow meaning is that a bail bondsman shall not suggest or advise, to the principal for whom he executes a bail bond, that the principal employ a particular attorney to represent him in the criminal case in which the bail bond is executed."

II. THIS STATUTE DOES NOT ABRIDGE THE PETITIONERS' FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The petitioners argue that to prohibit bail bondsmen from suggesting a particular attorney is a violation of their First and Fourteenth Amendment rights to free speech and expression. In support thereof, petitioners and the McCracken Circuit Court cite *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405 (1962), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 12 L.Ed. 2d 89 (1964) and numerous other related cases, all of which involved situations where labor unions or minority groups were prosecuted for referring their members to a particular attorney or group of attorneys.

The respondent contends that these cases have no relevance to the case at bar. When this and other courts reversed convictions for referral activities in *Button* and others, it was because the referral situations therein were essential to the advancement of the political beliefs of the groups involved. Moreover, in *Button,* this Court expressly recognized that a compelling state interest in the regulation of a subject can justify limiting First Amendment freedoms.

Hence, it is apparent that while the protective umbrella of *Button* and the other cases relied on by the petitioner is wide enough to protect any lawful political expression or association, it is not so wide as to protect any form of speech by any individual under any circumstances. To equate the objectives of bail bondsmen with those of the NAACP or even the Ku Klux Klan is to libel the entire movement for freedom of political expression. Not even the most naive among us could believe that when a bail bondsman recommends to his principal a particular attorney he is advocating any political objective, unless the preservation and enrichment of bail bondsmen could be considered as such an objective.

This Court has never accepted the proposition that all speech is protected under every circumstance. Moreover, the respondent submits that the actions of a bondsman in suggesting an attorney to his principal is not a form of expression protected by the First and Fourteenth Amendments. Therefore, a statute pro-

scribing that particular conduct is not, ipso facto, unconstitutional.

III. THE STATUTE IS NOT AN ATTEMPT TO REGULATE THE LEGAL PROFESSION FOR THE PROTECTION OF THE PUBLIC INTEREST.

The petitioners have somehow gotten the impression that KRS 304.34-080 (1) (g) was enacted to regulate the legal profession. This conclusion is totally erroneous. The legal profession is scrupulously regulated by the respective bar associations through the medium of the courts. The statute in question was enacted by the Kentucky General Assembly in 1970 for the purpose of regulating the bail bond business.

At this point it must be pointed out that the bail bond business affords peculiar opportunity for fraud and unethical practices. One of the most damaging of these practices is an agreement whereby bondsman and attorney work together, each funneling clients to the other. It is too obvious for argument that such an agreement can only hurt the principal who, at such a time, needs, and is entitled to fair and unbiased legal advice from an attorney who is working solely for the benefit of the principal and not for the bondsman who stands behind the principal.

KRS 304.34-080 (1) (g) was promulgated to prohibit just such an unconscionable agreement by imposing criminal sanctions on any bail bondsman who suggests the employment of any particular attorney. The respondent contends that this provision is neces-

sary to insure that every arrestee is given the opportunity to obtain effective counsel and to prevent a bail bondsman from profiting from the arrestee's need for counsel.

IV. THE STATUTE IS A REASONABLE EXERCISE OF THE COMMONWEALTH'S POLICE POWER.

It has long been accepted that the State has the power to regulate conduct and activities that threaten the peace and well being of the State and its citizens. This is the "police power" of the State. The respondent submits that the regulation of the bail bond business is a valid exercise of the Commonwealth's police power.

That the bail bond business poses a threat to the public welfare and, hence, is subject to regulation under the State's police power has been consistently upheld in all jurisdictions. A cogent explanation of the rationale behind this regulation was laid down by the Supreme Court of Georgia in *Jackson* v. *Beavers,* 156 Ga. 71, 118 S.E. 751 (1923), wherein the court stated:

> "The business of professional bondsmen affords peculiar opportunity for fraud and imposition upon the persons whom they serve. Besides, such business may be so conducted as to seriously interfere with the fair and proper administration of the criminal laws. The unscrupulous may devise means and methods for the escape of violators of the penal statutes. They may use improper and illegal means to secure the acquittal of the clients. For these and other reasons which could be given,

this business comes within the police power of the state."

For other cases holding that the bail bond business is subject to regulation under the State's police power see: *McDonough* v. *Goodcell*, 91 P.2d 1035 (1939); *State ex rel. Howell* v. *Schiele*, 91 N.E. 2d 5 (1949); *Baltimore* v. *Stuyvesant Ins. Co.*, 174 A.2d 153 (1961); *Summit Fidelity and Security Co.* v. *Nimtz*, 64 N.W. 2d 803 (1954); *Doe* v. *O'Brien*, 217 A.2d 189 (1966).

The respondent further contends that KRS 304.34-080 (1) (g) is a *reasonable* exercise of the Commonwealth's police power. Any exercise of the police power necessarily involves a balancing of interests: individual freedoms on one hand, the interest of society in regulating harmful conduct on the other. This proposition was restated in *Colten* v. *Commonwealth*, U.S. , 32 L.Ed. 2d 584, S.Ct. (1972), wherein this Court held that the state's "important or substantial governmental interest" which is the basis for the police power in the area of First Amendment freedoms, must be weighed against the particular exercise of these freedoms that the state is attempting to regulate.

As has been shown, the Commonwealth has a substantial and valid interest in regulating the bail bond business. The petitioners, however, have not shown that the bail bondsman has any important and substantial interest in recommending a particular attorney to his principal. Therefore, the respondent submits that, in the case at bar, the interest of the

State weighs heavier in balance. For that reason, the statute in question is a reasonable exercise of the police power.

CONCLUSION

KRS 304.34-080 (1) (g) is a reasonable and necessary exercise of the Commonwealth's police power. The petitioners have failed to raise any substantial constitutional issue. Therefore, the respondent respectfully requests that the petition be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Carl Miller, counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on February 23, 1973, addressed to counsel for petitioners, Honorable E. W. Rivers, P. O. Box 1407, Avondale Station, Paducah, Kentucky 42001, and Attorneys for Kentucky Bar Association, John J. O'Hara and Leslie J. Whitmer, 243 State Capitol, Frankfort, Kentucky 40601.

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RENDERER:
November 3, 1972

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH
OF KENTUCKY ..... Appellant

V.

LEROY HAYDEN and JOHNSON
BONDING COMPANY, INC. ..... Appellees

AND

COMMONWEALTH
OF KENTUCKY ..... Appellant

V.

JAMES C. JOHNSON and JOHNSON
BONDING COMPANY, INC. ..... Appellees

CONSOLIDATED APPEALS FROM
McCRACKEN CIRCUIT COURT
HONORABLE BRANDON PRICE, JUDGE

OPINION OF THE COURT
BY COMMISSIONER CULLEN

CERTIFYING THE LAW

James C. Johnson and his employer, Johnson Bonding Company, were indicted on three counts of accepting money for a bail bond in excess of the

premium for the bond, in violation of KRS 304.34-080 (1)(e), and on three counts of suggesting to and advising a person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Leroy Hayden and his employer, Johnson Bonding Company, were indicted on three counts of suggesting to and advising a person for whom a bail bond was written that he employ a particular attorney to represent him, in violation of KRS 304.34-080(1)(g). Each of the charged offenses was punishable, under KRS 304.99-030, by a fine of not more than $500 or imprisonment in the county jail for not more than six months, or both.

The circuit court dismissed the indictments and the Commonwealth has appealed under KRS 21.140(3) for a certification of the law.

The ground on which the circuit court dismissed the indictment as to the charges of suggesting or advising employment of a particular attorney, in violation of KRS 304.34-080(1)(g), was that the statute is unconstitutional, being in "violation of both the First Amendment * * * and the Fourteenth Amendment of the Constitution of the United States and * * * of the Bill of Rights of the Commonwealth of Kentucky."

The ground on which the indictment was dismissed as to the charges of accepting money for a bail bond in excess of the premium was that the counts "were not based upon the complete records and do not

constitute an offense as drafted, and * * * fail to set forth that the amounts alleged to have been received were not collateral security as allowed by" KRS 304.34-080(1)(e).

We shall consider first the question of constitutionality of the provision of KRS 304.34-080(1)(g) that no bail bondsman shall "Suggest or advise the employment of any particular attorney to represent the principal."

As stated in Colten v. Commonwealth, Ky., 467 S.W. 2d 374, aff. ..... U.S. ..... 32 L. Ed. 2d 584, ... S.Ct. ....., the government's "important or substantial governmental interest" which must exist as a basis for regulation under the police power in the area of First Amendment freedoms, is relative to the importance or substantiality of the particular purported exercise of one of those freedoms.

The state government has an important and substantial interest in the regulation of the legal profession and the protection of the public from the evils of solicitation of business and referral agreements. Likewise the state has an important and substantial interest in the regulation of the bail-bond business, which has features making it pecularily an appropriate subject for police-power regulations. See Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751.

There is no showing, however, of any important and substantial interest on the part of a bail bondsman in the suggesting or recommending of the em-

ployment of an attorney. Therefore, in the balance of interests, the government's interest is overwhelming, and justifies the regulation in question.

The trial court's reliance on N.A.A.C.P. v. Button, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328, is, we think, misplaced. The holding there simply was that the N.A.A.C.P. had such an important and substantial interest in the recommending and employing of counsel for Negroes as to outweigh the state's interest in regulating the legal profession, the interest of the N.A.A.C.P. being to associate for the advancement of beliefs and ideas, and their activity being a form of political expression. The Supreme Court expressly recognized, in *Button*, that a compelling state interest in the regulation of a subject within a state's constitutional power to regulate can justify limiting First Amendment freedoms. In *Button* the state's interest did not weigh enough in the balance. In the instant case it does.

For the same reason, this case is not controlled by the labor union cases: Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L. Ed 2d 89; United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 19 L. Ed 2d 426; and State Bar of Michigan v. Brotherhood of Railroad Trainmen, 374 Mich. 152, 132 N.W. 2d 78. Those cases held only that the unions had an important and substantial interest in the procuring of legal representation for their members, which outweighed the state's regulatory interest.

We find nothing overbroad or vague in the statute in question. Its plain, narrow meaning is that a bail bondsman shall not suggest or advise, to the principal for whom he executes a bail bond, that the principal employ a particular attorney to represent him in the criminal case in which the bail bond is executed.

It is our conclusion that the statute in question is valid.

We come now to the sufficiency of the indictments as relates to the charges of accepting money in excess of the premiums for the bail bonds. The statute, KRS 304.080(1)(e), following its prohibition against accepting anything of value from the principal except the premium, sets forth two exceptions introduced by the words, "provided that." One of the exceptions is the acceptance of collateral security. The circuit court held the indictments insufficient for failure to "set forth that the amounts received were not collateral security as allowed by" the statute. In this holding the circuit court was in error, since under RCr 6.10 an indictment need not negative any exception, excuse or proviso contained in the statute creating or defining the offense charged.

The circuit court, in dismissing the indictment as to the excess-money charges, mentioned the fact that the defendants had filed, with their motions to dismiss, some documentary evidence that the amounts they were charged with having taken in excess of the premiums either constituted deposits of collateral or

were received in independent business transactions not related to the bail bonds, and the court stated in its order of dismissal that the indictments "were not based upon the complete records." In considering this evidence the court in effect adopted a summary judgment theory. There is no authority for the use of summary judgment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss.

The law is certified as set forth in this opinion.

All concur.

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